

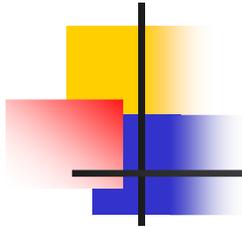
# The Devil of Common Parts – Part II (on Partition Walls)

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- Speakers

- Mr. Gary Yeung, FHKIS

- Mr. James Kenneth Pong, FHKIS



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# Definition of Common Parts under BMO

- But Schedule must be read in conjunction with part (a) of the definition of “common part” under s.2 of BMO :-



“common parts” (公用部分) means :-

- (a) the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner;

**and**

- (b) unless so specified or designated, those parts specified in Schedule 1;

# First Schedule of BMO



- External walls and load bearing walls, foundations, columns, beams and other structural supports.
- Walls enclosing passageways, corridors and staircases.
- The roofs, chimneys, gables, gutters, lightning conductors, satellite dishes and ancillary equipment, aerials and aerial cables.
- Parapet walls, fences and boundary walls.
- Vents serving 2 or more flats.
- Water tanks, reservoirs, pumps, wells, sewers, sewage treatment plants, drains, soil pipes, waste pipes, channels, water-courses, gutters, ducts, downpipes, cables, conduits, refuse chutes, hoppers and refuse container chambers.

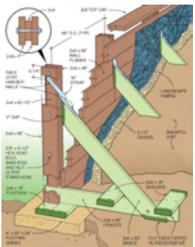
# First Schedule of BMO



- Cellars, toilets, **water closets**, wash houses, bathhouses, kitchens and caretakers' flats.
- Passageways, corridors, **staircases**, landings, light wells, staircase window frames and glazing, hatchways, roofways and outlets to the roofs and doors and gates giving access thereto.
- Lifts, escalators, **lift shafts** and machinery and apparatus used in connection therewith and the housing thereof.
- Lighting apparatus, air conditioning apparatus, central heating apparatus, fire fighting equipment and installations intended for the use and benefit of all of the owners generally and any room or chamber in which such apparatus, equipment or installation is fitted or installed.

# First Schedule of BMO

- Fixtures situated in a flat which are used in connection with the enjoyment of any other flat or other portion of the building.
- Lawns, gardens and playgrounds and any other recreational areas.
- Swimming pools, tennis courts, basketball courts, squash courts and premises containing or housing any other sporting or recreational facilities.
- Clubhouses, gymnasiums, sauna rooms and premises containing health or leisure facilities.
- Slopes, gradients and retaining walls including sea walls (if any) comprising or forming part of any land which is in common ownership with the building.



# s.34C and s.34H of BMO

- s.34H of BMO provides :-

*(1) Where a person who **owns** any part of a building, has the right to the exclusive possession of any part of a building or has the **exclusive right to the use, occupation or enjoyment of that part**, as the case may be, but the **deed of mutual covenant in respect of the building does not impose an obligation** on that person to maintain the part in good repair and condition, that person shall maintain that part in good repair and condition.  
(Amended 69 of 2000 s. 14)*

*(2) The obligation in subsection (1) shall be **deemed to be an obligation** owed to all owners of the building under the deed of mutual covenant.*

- s.34C(2) of BMO provides :-

*In the event of any **inconsistency between this Part and the terms of a deed of mutual covenant** or any other agreement, **this Part shall prevail.***

# (1) Canopy –

## Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

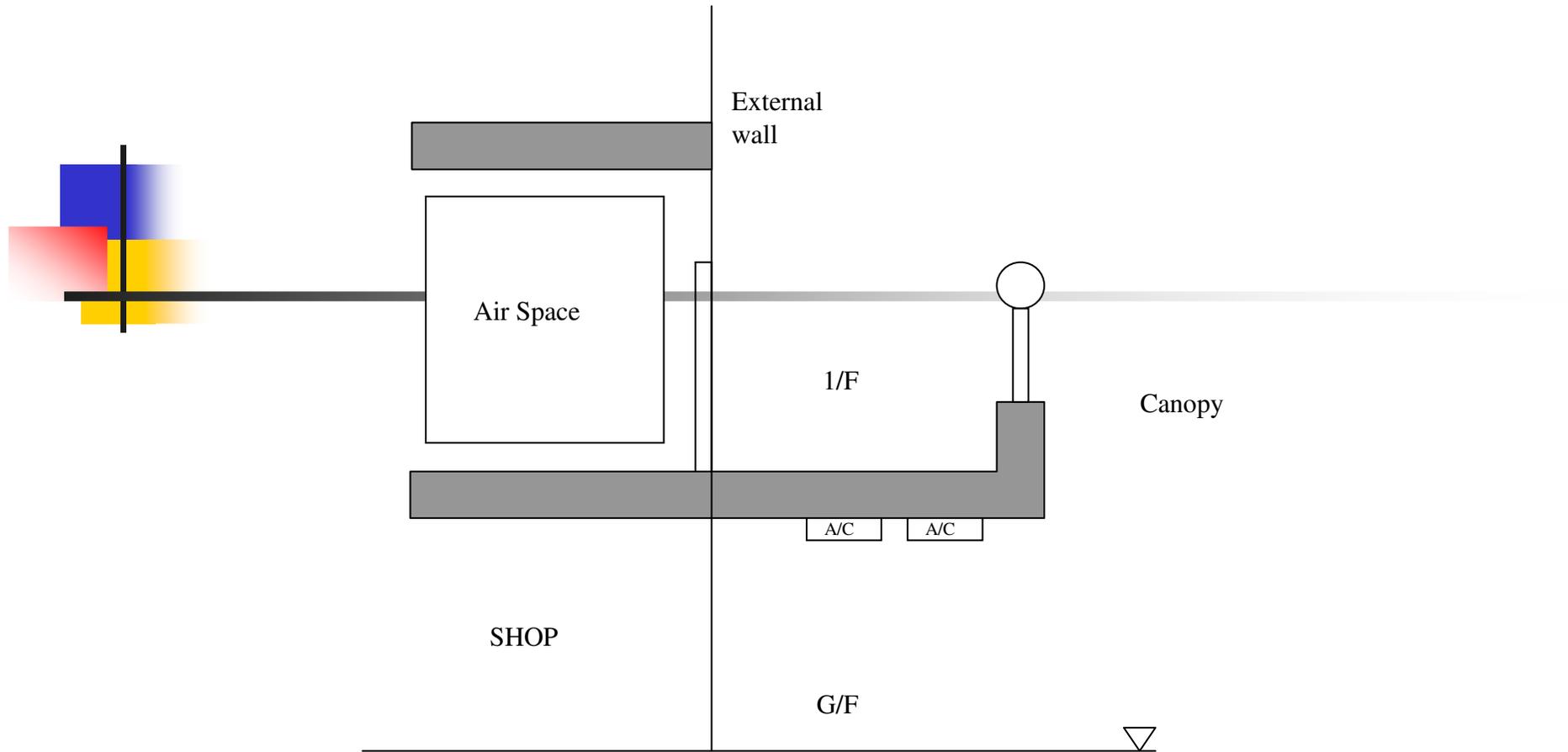
- The appellant entered into a provisional agreement to purchase from the respondent two of the ground floor shops together with the **entire first floor, the canopy and the flat roof**
- The executed formal sale and purchase agreement states : “ALL THOSE 11 equal undivided 228<sup>th</sup> parts or shares of and in ALL THAT Tsuen Wan town Lot No. 190 ..... And of and in the messuages, erections and buildings thereon known at the date hereof as CHEONG WAH BUILDING .... Together with the **sole and exclusive right to use occupy and enjoy** FIRST ALL THAT Shop 12 on the Ground Floor of the said building and the SECONDARY ALL THAT the **entire FIRST FLOOR and its Canopy** and the Flat Roof thereof of the said Building.”
- What gave rise to the dispute in the present case were certain unauthorized structures consisting of cocklofts, air-conditioning units and advertising signs attached to or suspended from the **underside** of the canopy. Those structures covered a large part of the canopy’s underside surface or **soffit**, some of them being of quite substantial construction.

# (1) Canopy –

## Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

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- The unauthorized structures attracted a requisition from the purchaser's solicitors who expressed concern as to their effect on the canopy's structural safety and as to the risk of enforcement action by the government or under the DMC
- It appears that the parties were at cross purposes in one fundamental respect. The purchaser was proceeding on the footing that it was to acquire "the sole and exclusive right and privilege to use occupy and enjoy" the ***whole*** of the canopy, including the parts to which the unauthorized structures continued to be attached. The vendor, on the other hand, believed that it had only contracted to sell rights to the exclusive use, etc, of ***the top surface*** of the canopy, so that any unauthorized structures attached to the underside were irrelevant



# (1) Canopy –

## Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

- “The correct approach again depends on the proper construction of the agreement. To take the first purchaser as an example, what Madam Chow acquired was one equal undivided 228th share in the Lot together with the right to the exclusive use of ‘Flat A1 on [the] Seventh Floor’. The reason why no one would suggest that Madam Chow thereby acquired any right to use the underside of the floor slab is **because the words ‘Flat A1 on the Seventh Floor’ .... do not, as a matter of construction, encompass the underside of the 7th floor slab.** It may be different if the agreement had been to grant her exclusive use of ‘the concrete floor slab’, but that is not what the contract was about.” (per Para. 33)
- “However, a grant of exclusive enjoyment of the canopy stands on a **very different footing.** ‘The canopy’ is a structure which **protrudes outwards from the external walls** of the building and so, unlike ‘flats’ or ‘shops’, **does not form part of its internal volume. No constraint involving any downstairs neighbour arises.** The agreement grants exclusive use of ‘the canopy’ as a specific, named structure, without limitation or qualification. Accordingly, **giving the words their natural meaning, the grant should be construed as comprehending the entire canopy.**” (per Para.35)

# (1) Canopy –

Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

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- Note that the Court of Final Appeal has affirmed the decision of the Court of Appeal :-
- “... the right to the exclusive use of “the First Floor ... includes the right to the exclusive use of the **floor and ceiling surfaces** of the First Floor **and of the air space between them ...”** (per Godfrey JA at Para. 5 of the Judgement)

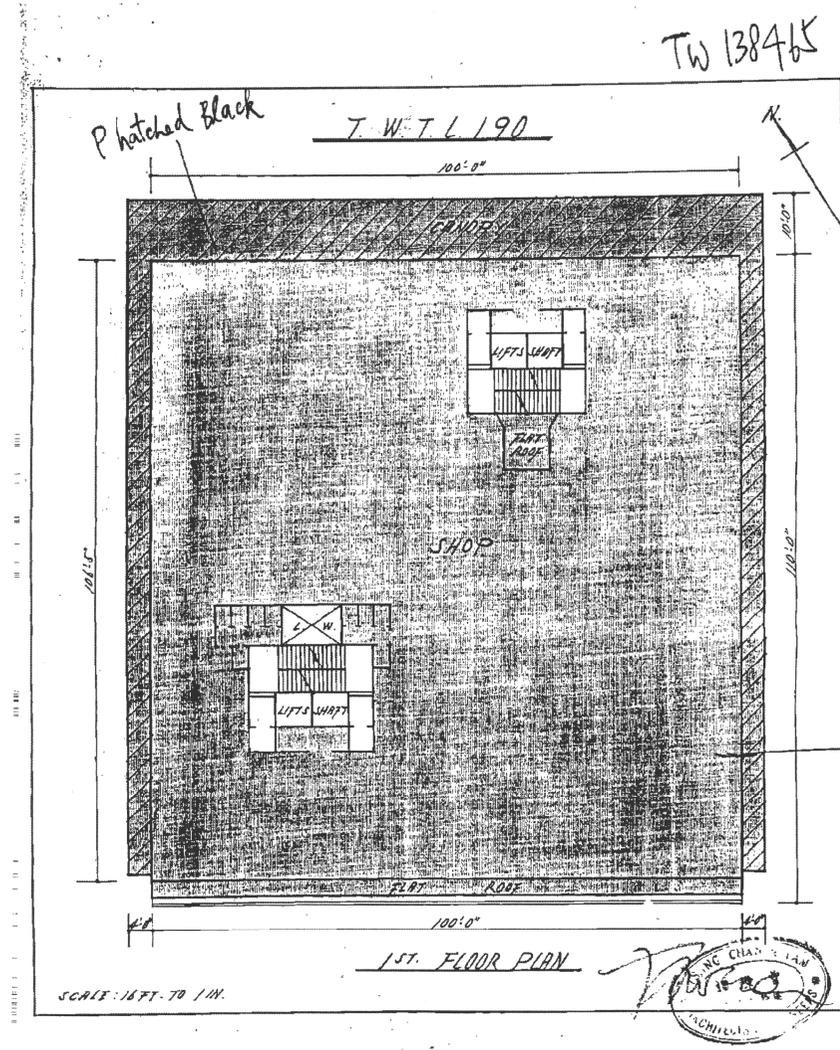
# (1) Canopy –

Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

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- “In deciding which (if either) of these contentions is correct, the starting point must be the **language** of the sale and purchase agreement itself. On its face, the **exclusive rights** to be given are to the **use, occupation and enjoyment** of ‘the **entire** first floor **and its canopy**’ **without qualification**. It therefore appears prima facie that the vendor did not seek to restrict such rights of enjoyment to the canopy’s top surface.” (per Para. 23)

# Assignment Plan : 1/F & its Canopy and the Flat Roof Cheong Wah Building 289/291 & 295/301 Castle Peak Road, Tsuen Wan



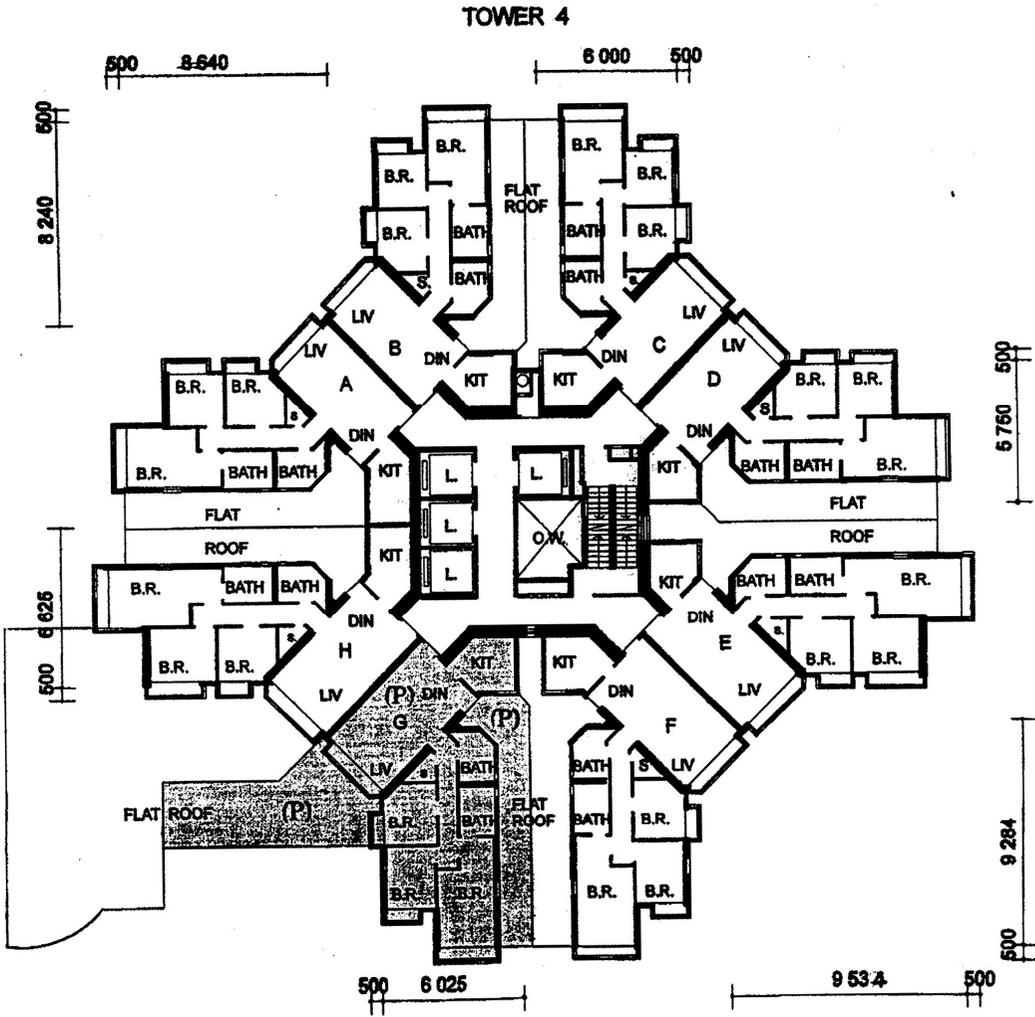
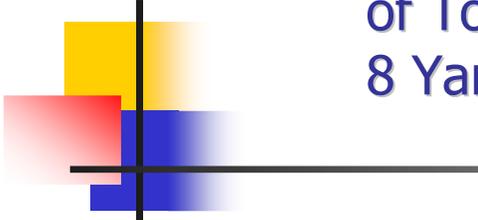
# (1) Canopy –

Nation Group Development Limited v New Pacific Properties Limited (2000) – Court of Final Appeal

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- In relation to the annexed plan, “(t)he **plan** complemented and **did not seek to cut down the textual description of the property in the contract.**” (per Para. 29)
- The word "canopy" was written on the shaded areas representing the canopy, obviously indicating that the plan's two-dimensional representation was intended to convey the existence of a three-dimensional structure which a canopy (and any other structure) necessarily is. It was accordingly **not** the **intention** of the parties that the purchaser was to be limited to the exclusive use of only "the top surface of the areas" shown in the plan. (per Para. 30)

Assignment Plan of Flat G on 1st Floor  
 and Flat Roof Appertaining thereto  
 of Tower 4, Metro City, Phase II  
 8 Yan King Road, Tseung Kwan O, Sai Kung, NT

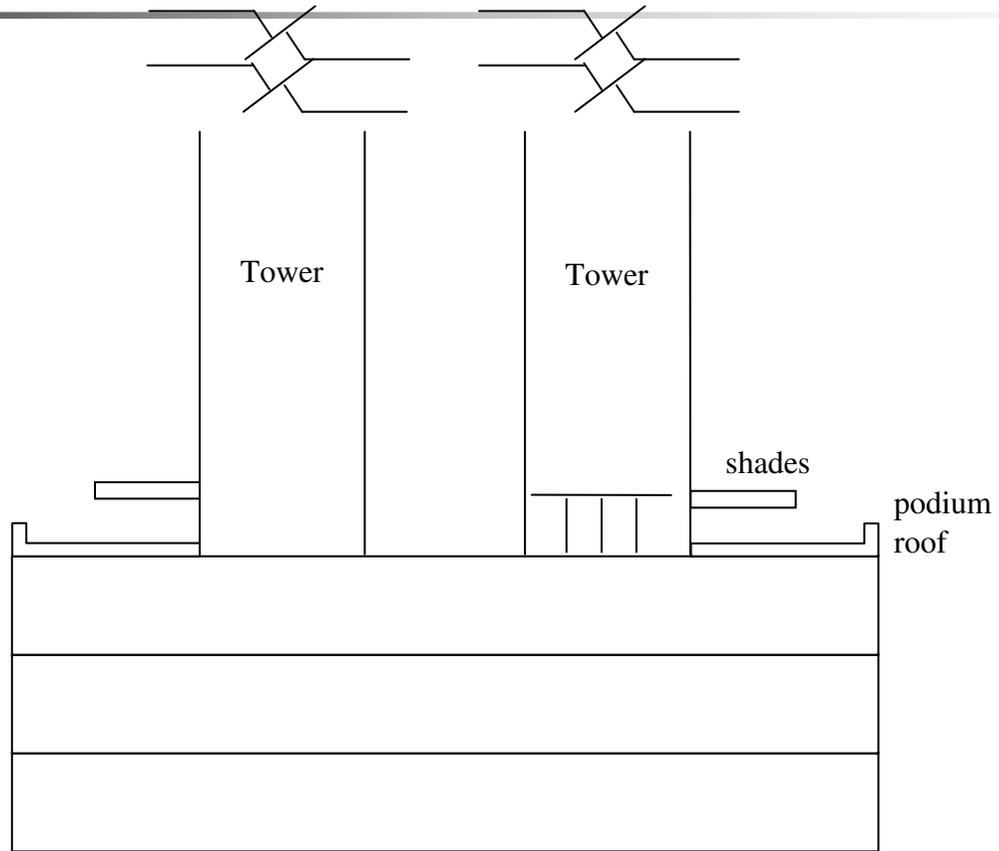
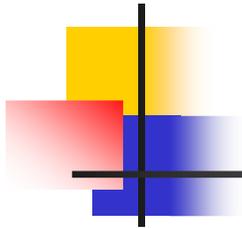


# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

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- By an assignment dated 30 June 2000, the defendants took an assignment of Flat G on the first floor and flat roof appertaining thereto, of Tower 4, Metro City, Phase II, Tseung Kwan O
- Shortly after the defendants purchased the property they erected three retractable canopies and one fixed canopy which extended over part of the flat roof area
- The Plaintiff claimed that the erection of the canopies, albeit bolted at a level within the height of the defendants' flat, was in breach of the DMC
- Mr Recorder Chan SC (the judge) held that the erection of the canopies had been in breach of Clause B1 of the DMC but had not been in breach of clauses B2 and B9
- The defendants appealed against the finding and the plaintiff cross-appealed in respect of the other two clauses of the DMC which the judge had held had not been breached

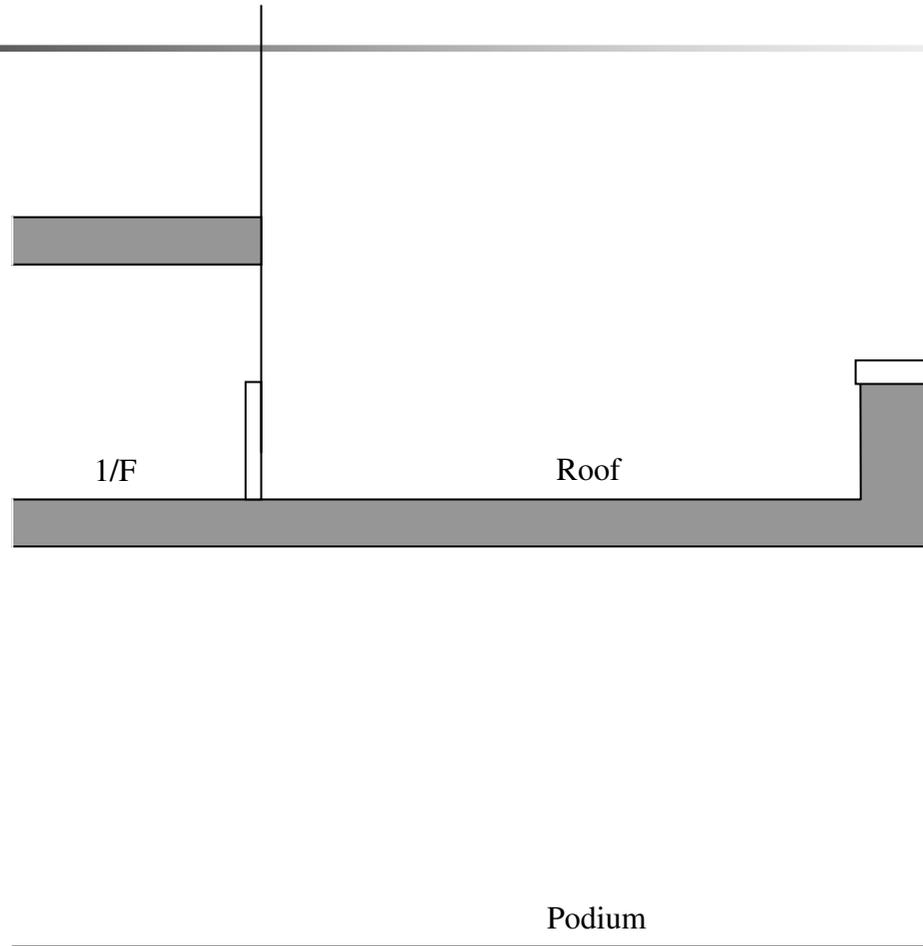
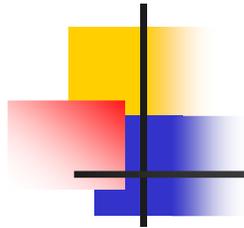


# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

- The relevant provisions, in section V of the DMC were the following:  
“B. Covenants, Provisions and Restrictions to be observed and performed by the Residential Owners:-

No external signs, etc. allowed	1. <b>No external</b> signs, signboards, notices, advertisements, flags, banners, poles, cages, <b>shades</b> , sculptures, <b>or other projections or structures whatsoever extending outside the exterior of any of the Towers shall be erected</b> , installed or otherwise affixed to or projected from any part of the Towers.
No alteration of external appearance	2. Air-conditioning units shall only be placed at the spaces provided and <b>no Residential owner shall do</b> or permit to be done any act or <b>thing which may or will alter the external appearance of the Towers.</b>
Restrictions regarding Residential Common Areas	9. <b>No part of the Residential Common Areas shall be obstructed</b> or incumbered nor shall any refuse be placed thereon. <b>No part of the Residential Common Areas can be converted to one’s own use</b> Provided such conversion is sanctioned by the Owners’ Committee and no Residential Owner shall do or permit or suffer to be done anything in the Residential Common Areas as may be or become a nuisance or cause annoyance to any other Residential Owners. “

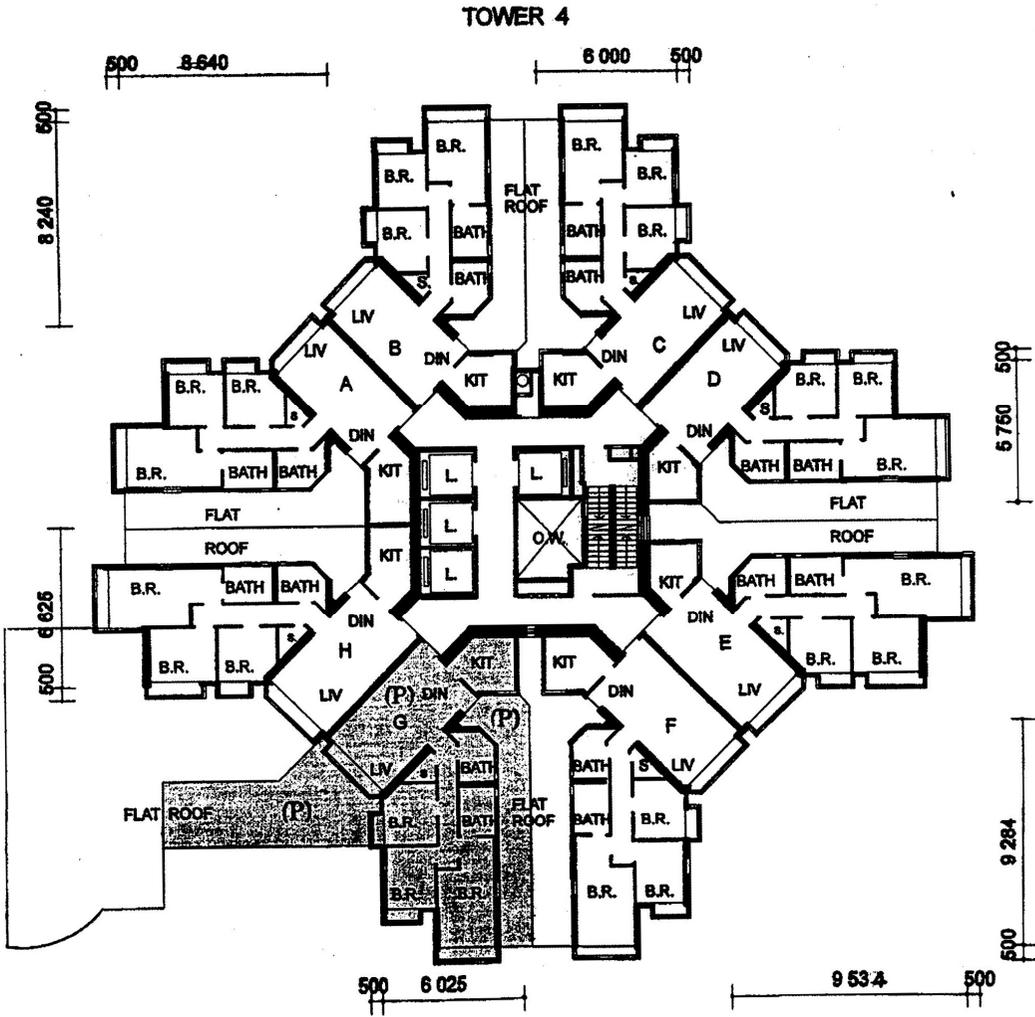
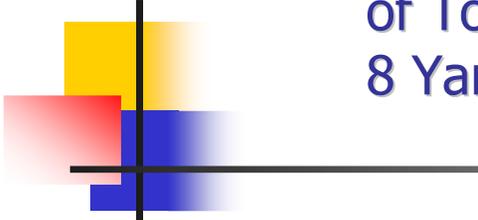


# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

- Hon Rogers VP:
- Clause B1
- The judge held that the canopies when extended would constitute a **shade** or other projection or structure. They were affixed to Tower 4 and that they extended **outside the exterior of Tower 4**
- The defendants firstly argued that **the first floor level of the Tower blocks was part of the podium and therefore not part of the Tower**. The defendants are based on the meaning of podium and towers in the DMC:
- “Podium” – The 8-level podium complex in the Estate comprising... and first floor level as shown on the Approved Plans”
- “Towers” – The eleven residential towers erected on top of the Podium.....”
- Hon Rogers **disagreed** by reading the first schedule of the DMC which relates to the allocation of undivided shares. Flat G and all other flats on the first floor and the flat roofs appertaining thereto are part of the respective Towers
- The second argument is that the canopies, **even when extended did not extend outside the area of the Tower because the area of the Tower includes the flat roof**
- Hon Rogers **disagreed** as the canopies extend outside the exterior of the Tower, because the Tower is just that and curtilage of the flat roof constitutes the boundary of the podium

Assignment Plan of Flat G on 1st Floor  
and Flat Roof Appertaining thereto  
of Tower 4, Metro City, Phase II  
8 Yan King Road, Tseung Kwan O, Sai Kung, NT



# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

- Clause B2
- The judge held that it is a question of fact. Hon Rogers considered that the management permitted washing to be hung outside the building, it can **hardly be said that a sunshade would alter the external appearance of the Tower**
  
- Clause B9
- The Plaintiff argued that the canopies obstructed the management from painting the exterior walls of the Towers. It is hardly convincing as the exterior walls are tiled and not painted
- Is it a Residential Common Areas converted to “one’s own use”? The term “Residential Common Areas” is defined as:
  - *“Those parts of the Residential Development not otherwise specifically assigned to or for the exclusive use of any one or more Residential Owners, including but not limited to.....external walls of the Towers.....”*
- **It would almost be absurd to consider that any of the other owners should have a right to access to that part of the wall which was otherwise clearly bounded by the defendants’ property**

# (1) Canopy –

Metro City Management Limited v Tsui Fee Hung  
Vincent and Lam Wai Fun (2005) – Court of Appeal

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- It seems that his Lordship Rogers was agreeing with the views of the Recorder Chan SC, who said that :-
- “The idea of having a common area within one’s property is an unattractive one. **Given that either side of the wall is occupied exclusively by the Defendant it is difficult to see how any other owners of Metro City may properly enjoy and make use of the wall. Hence I am of the view that the wall in question is not part of the Residential Common Areas.”**

# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

- Hon Woo VP:
- He only deal with Clause B1 by asking what is crucial is what “the exterior of any the Towers” is. The word “Towers” is defined in the DMC (pls refer to slide 3) but there is no definition of “exterior” in the DMC
- He makes use of the terms “external walls” and “exterior walls” (they are words found in the DMC) to aid the understanding of “exterior”, which can reasonably be understood as delineating the exterior from the interior, bearing in mind that clause B1 prohibits “external” “shades” and “projections”. **The fact that the Towers stand on the podium covering the areas of the flat roofs does not render the external walls of the podium to become the external walls and thus the exterior, of the Towers.**
- **Although the area of the flat roof had been assigned to the defendants, it does not extend the exterior of the Towers to the boundary of the podium**
- He also entirely agreed with the judge’s argument by citing the case of ***Hong Yip Service Company Ltd. v Ng Wai Man*** (CACV 159 of 1988):
- *“the management company sought an injunction against the owner of the top floor and the roof of a building, requiring the owner to remove three external radio aerials which were affixed to poles which extended about 6 feet above the parapet walls of the roof..... one of the clauses relied upon by the management company..... no post or other projections or structures whatsoever extending outside the exterior of the building shall be erected, installed or otherwise affixed to or projected from the building or any part thereof except with the written consent of the Manager. The Court of Appeal held that the aerial in question was in breach of this clause..... **We accept that the defendant a right to the use of limited air space above the roof. However the exterior of the building.....defined by the boundaries delineated by the external walls and not by any right to use of air space**”*

# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

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- Hon Yuen JA:
- Clause B1
- Clause B1 is contained in Section V B which set out the “Covenants, Provisions and Restrictions to be observed and performed by the **Residential Owners**”
- A “Residential Owner” is defined as “**an Owner entitled to the sole and exclusive right and privilege to hold use occupy and enjoy a Residential Unit**”. Defendants obviously occupy a residential unit
- Residential Development is defined as “**the Towers and the Residential Common Areas and Facilities...**” if the Defendants are right, their premises are not even situated in the Residential Development and their unit is not even a Residential Unit. This produced an absurd result.
- Hence, it is clear that the Defendants’ first floor premises are part of the “Towers”
- In relation to the second argument of the Defendants, it is simple that “**exterior of the Towers simply means “external surface” of the tower blocks**”

# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

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- Clause B2
- The judge found that there was only a de minimis breach of this clause because the canopies did **not prominently alter the appearance** of Tower 4
- Not intend to interfere with a trial judge’s finding of fact unless there were no materials which could support his finding
- Clause B9
- Whether the external walls to which the canopies are attached are “Residential Common Areas”
- When considering the definition of “Residential Common Areas” (pls refer to slide 4), prima facie, the external walls of the towers are Residential Common Areas unless they have been “otherwise specifically assigned to or for the exclusive use of any one or more Residential Owners”. **So the issue is: has it been shown that the external walls in question had been “specifically assigned to or for the exclusive use of the Defendants”?**
- **“Saleable area” formulation not reliable guide** – unlikely that the draftsman of the DMC would have expected that sort of exercise to have to be undertaken before an owner or manager could determine whether a wall was for exclusive use or was common area

# (1) Canopy –

## Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal

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- Hon Yuen considered the judge rightly held that:
- *“the description of the Defendants’ property in the Agreement would show that if the wall in question is an external wall of the Defendants’ property, then it would not be part of the property agreed to be sold to the Defendants”*
- Hon Yuen agreed to the judge that it would be an unattractive proposition to have a commonly-owned wall between areas exclusively occupied by the same owner as one unit. It is difficult to see how any other owners could enjoy and make use of the walls in question. In contrast, the Defendants would stand to benefit from maintenance of the external walls as a common area at the cost of the co-owners
- So the issue is simply whether the walls are “external walls of the Property?” Hon Yuen considered all the words “external walls of the Property” are those walls of the Property which are exposed to the outdoors. Take the example of a house standing in a walled garden. Hon Yuen considered that **both the walls of a house, as well as the walls of the garden, would be external walls of the owner’s property.**
- Following that line of argument, the judge would have held that the Defendants had breached the clause **by converting the external walls in question to their own use.** In other words, Her Ladyship was of the view that the external wall concerned was a **common area.**

# (1) Canopy –

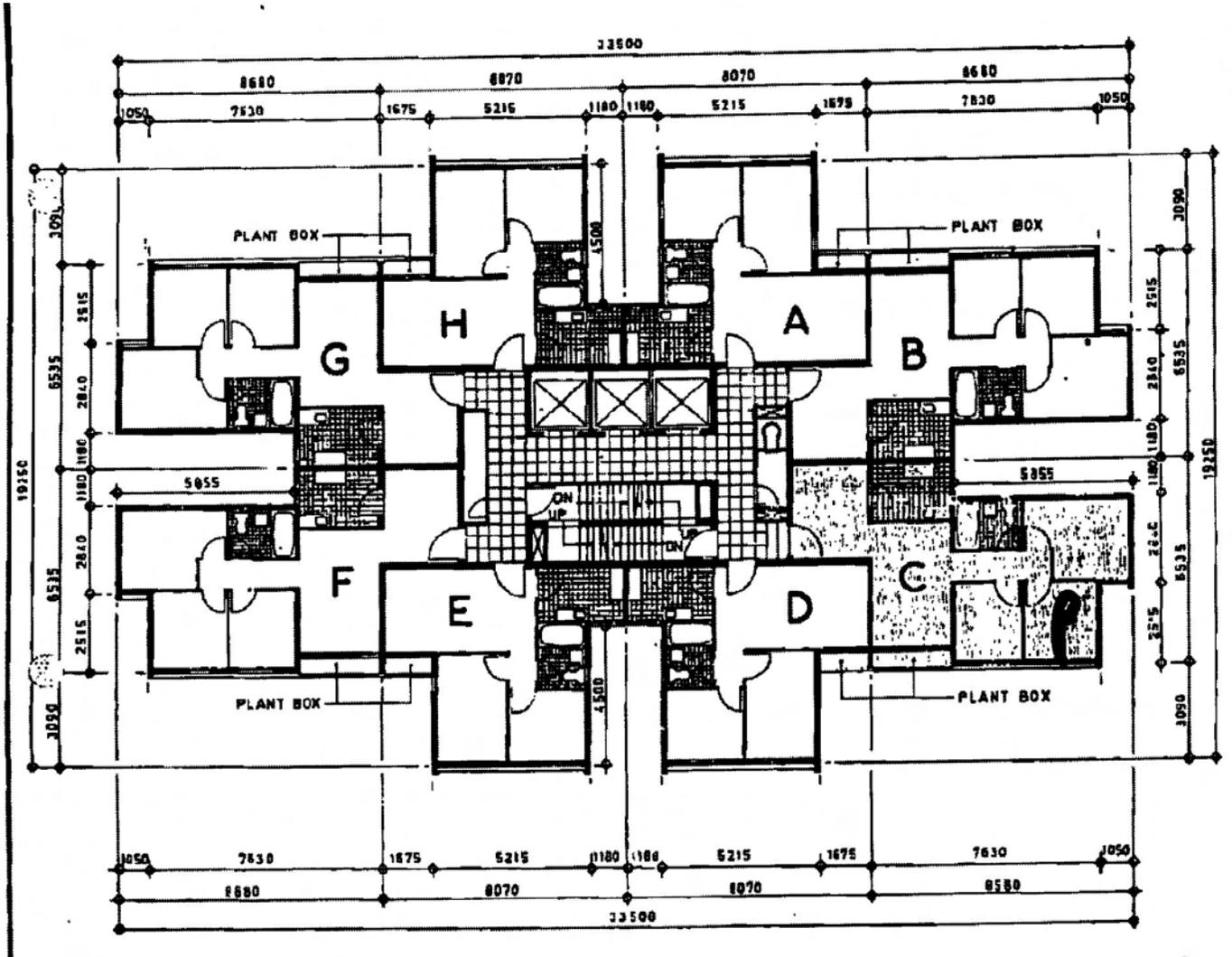
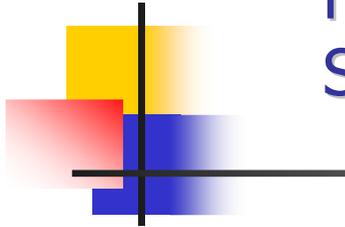
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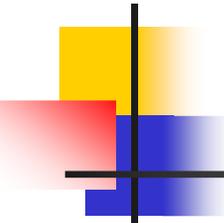
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Hon Yuen JA commented on the use of “Saleable Area” :-

“ ... I am therefore **not** persuaded that the use of ‘saleable area’ is a reliable guide in the determination of the issue whether the external walls in question had been ‘specifically assigned to or for the exclusive use of’ the Defendant.

# Assignment Plan For Block H-7 FU YI YUEN 21st Floor Flat C, CHI FU FA YUEN, Section C of I.L. 8442





## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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- An owner of 2 adjoining units, Flat C and Flat D, of Chi Fu Fa Yuen wanted to make an opening at the load –bearing wall so as to convert the 2 flats into a single unit.
- He engaged an architect and a RSE to make submissions/applications to the BD and to supervise such building work.

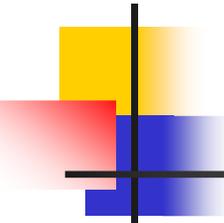
## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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- Plans were approved by BD and consent to the commencement and carrying out of building works was granted.
- During the construction work, excessive noise was emanating from the flats and his neighbours complained to the Property Manager.





## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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- District Councilor, the police and many residents of that block negotiated with the owner's contractor to stop demolishing the structural partition wall, but in vain.
- Solicitors of the Property Manager demanded the wall to be reinstated, alleging that such removal of any portion of the said wall was a breach of the DMC and s.34I of the BMO.

## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)



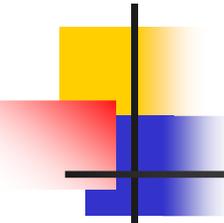
- DMC :-

- Clause 5 of the DMC provides that:-

- “The owner or owners shall at all times hereafter be bound by and shall observe and perform the covenants provisions and restrictions contained herein and in the **Second Schedule** hereto.”

Paragraph 4 of the **Second Schedule** of the DMC provides that:-

- “Save as provided in Clause 16(d) hereof, **not to make any structural alteration to any flat or shop** of which he is the owner which may damage, or affect or interfere with the use and enjoyment of any other part of any building on the Estate whether in separate or common occupation or use, **nor cut, injure, damage, alter or interfere with any part or parts of any building in common use** or any of the sewers, drains, water-courses, conduits, pipes, cable, wiring, fixtures, equipment apparatus or services of any building on the Estate.”



## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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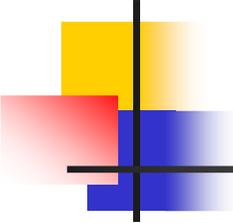
- Clause 17(b) of the DMC provides that:-
  - “The **House Rules** set out in the Third Schedule hereto shall come into force on the date of these presents and shall remain in force until expressly revoked or amended by the Company. ... Such **House Rules shall be binding on all the owners** and may be enforced as herein provided.”
  
- Paragraph 4 of the **House Rules** provides that:-
  - “**Not to make any structural alteration to any flat or shop** of which he is the owner which may damage, or affect or interfere with the use and enjoyment of any other part of any building on the Estate whether in separate or common occupation or use, nor cut, injure, damage, alter or interfere with any part of parts of any building in common use or any of the sewers, drains, water-courses, conduits, pipes, cable, wiring, fixtures, equipment apparatus or services of any building on the Estate.”

## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

- Clause 20 of the DMC provides that:-
  - “Each owner may place in his own flat or shop at his own expense any additions, improvements, fixtures, fittings and decoration Provided the same may be installed fixed and removed **without structural damage** to or interference with the enjoyment of any of the buildings on the land or any parts thereof or any of the services apparatus and equipment of any of such buildings and each such owner shall have the right to remove the same at his own expense”





## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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- The owner argued that according to the Code of Measuring Practice (1999) issued by the HKIS, the saleable area contained within the enclosing walls of an unit should be measured up to the exterior face of an external wall or “the centre line of a separating wall between adjoining units”.
- HH Judge Wong rejected such arguments of saleable area.

## (2) Loadbearing partition wall –

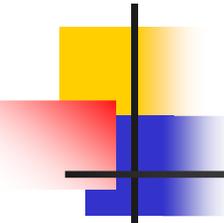
Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

- Another main issue was : whether the wall is a common part of the building ?
- Held :-
  - Since there is no definition of “common part” or “common area” in the DMC; and
  - There is no assignment designating the wall is for the exclusive use, occupation or enjoyment of any owner,

therefore, Schedule 1 of BMO, namely “load bearing wall” is applicable. The District Judge commented : **“It is therefore clear to me that the Wall is a common part of the Building”**.

(Paragraph 22 of the Judgement)





## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

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- HH Judge Wong distinguishes this present case from the Metro City case because :-
- “The Respondent has **not produced the sale and purchase agreements as evidence**. It is unknown whether the sale and purchase agreements of Flat C and Flat D would reveal the same as that found in ***Metro City***. The deed of mutual covenant in ***Metro City*** made it clear that the premises purchased by that Plaintiff **were to be regarded as one unit**. However there is no such equivalent clause in the DMC. The Respondent has simply purchased **two** separate units instead of one single unit.” (Para. 32)

## (2) Loadbearing partition wall –

Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

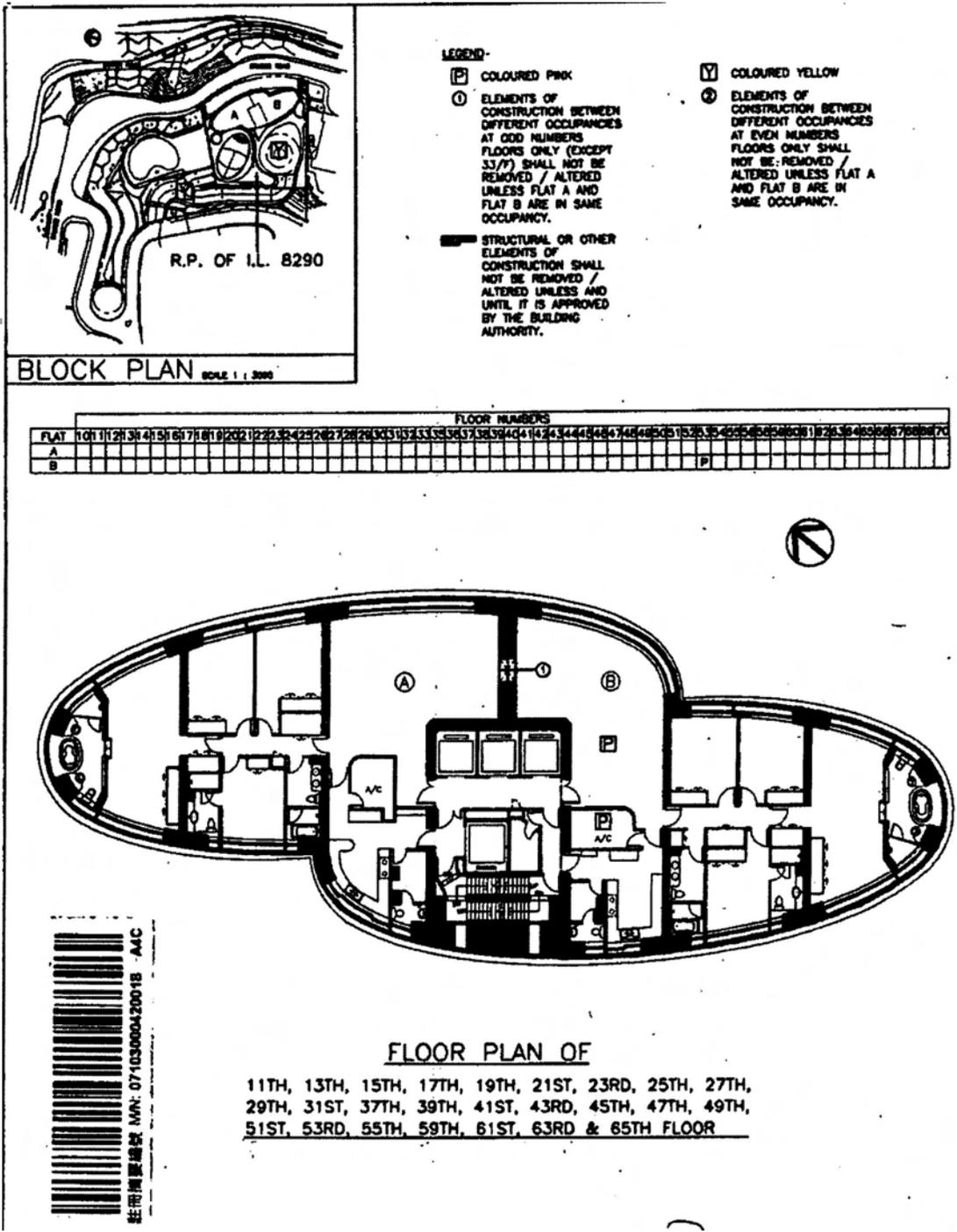
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- HH Judge Wong rejected such arguments of saleable area.
- He then ruled that the partition wall is a common part of the building and the owner has breached the DMC and s.34I of BMO.
- Though he also agreed that the opening at the wall, the wall and the building was still structurally safe, he considered the real question should be whether the opening has damaged, affected or interfered with the use and enjoyment of the building.
- Injunction was granted to reinstate the wall





Assignment Plan of  
 Floor 53rd of  
 Highcliff, No.41D  
 Stubbs Road  
 R.P. of I.L. 8290  
 Hong Kong



## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd and Others (2010) – Court of Appeal

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- The defendants are the registered owners of 2 adjoining flats, namely Flats 53A and 53B on the 53rd floor of a high-rise residential building situated at No.41D Stubbs Road, Hong Kong known as Highcliff (曉廬).
- They have removed a designated part of the partition wall (“the Permitted Opening”) constructed between the 2 units so as to connect the two flats internally. The Permitted Opening is made of bricks and is non-structural in nature. However, other than the Permitted Opening, they also tried to remove the **structural or other element of construction which should not be carried out unless and until it is approved by the Building Authority**, in order to make the opening went beyond the area of the Permitted Opening.

## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd  
and Others (2010) – Court of Appeal

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- Whether the partition wall is within the ambit of Common Areas and Facilities is a matter of construction of the terms of the title documents. (per Para. 17)
- The construction of such document is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. (per Para. 17)

## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd  
and Others (2010) – Court of Appeal

- **Assignment of Flat 53A**

- "... the property described in Part I of the Second Schedule hereto ("the property") EXCEPTING AND RESERVING unto the Vendor such rights as set out ... **AND SUBJECT to and with the benefit of the Deed of Mutual Covenant and Management Agreement** ("the Deed of Mutual Covenant and Management Agreement") ....."

- The relevant part of the description of the property in the Second Schedule of the Assignment is as follows :-

- "The Property :-

- **(A) Description, Address, Lot Number and Undivided Shares etc.**

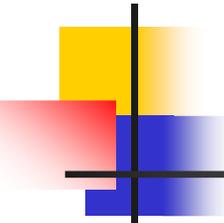
- ALL THOSE **473 equal undivided** 83,646th parts or shares .... TOGETHER with the **sole and exclusive right and privilege to hold use occupy and enjoy ALL THOSE FLAT A on the FIFTY THIRD FLOOR** and PARKING SPACES NOS. 47 and 48 on the SIXTH FLOOR of the development (which said Flat and Parking Spaces are shown on the **Floor Plan(s) annexed hereto and thereon coloured Pink**)

# (2) Loadbearing partition wall –

## Central Management Ltd v Light Field Investment Ltd and Others (2010) – Court of Appeal

### ■ (B) Excepting and Reservations :-

- ..... (b) **Excepting and reserving unto the Vendor** its successors and assigns other than the Purchaser the right to the exclusive use occupation and enjoyment of the whole of the Development save and except :-
  - (i) The Property; and
  - (ii) such areas and facilities (if any) as may be designated as common areas and common facilities in the Deed of Mutual Covenant and Management Agreement or are intended for common use.
  
- **There are three legends shown on the annex plan**
  - a) The first is in respect of the area **coloured pink** and marked as [1]. The description of this part is 'Elements of construction between different occupancies at **odd numbers floors only** (except 33/F) shall not be removed / altered **unless Flat A and Flat B are in same occupancy**'.
  - b) The second is in respect of the area **coloured yellow** and marked as [2]. The description of this part is 'Elements of construction between different occupancies at even numbers floors only shall not be removed / altered **unless Flat A and Flat B are in same occupancy**'.
  - c) The third is in respect of the part marked by thick black lines and the description is 'Structural or other elements of construction shall not be removed / altered unless and until it is approved by the Building Authority.'



## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd and Others (2010) – Court of Appeal

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- The areas marked [1] and [2] are the areas known as the permitted area in the partition wall of respectively odd and even numbered floors which can be opened up by a **common owner of two adjoining flats**.
- Counsel for the Defendants argued that the first owner of the unit can remove the partition wall which is a 'structural or other elements of construction' if consent of the Building Authority is obtained.
- In fact, the Building Authority had already given consent to the defendants to demolish part of the partition wall to create a larger opening between the two units.

## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd  
and Others (2010) – Court of Appeal

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- Held : The court **do not** regard the third legend as an indication by the **developer** that it had **intended to assigned the partition wall to the defendants**.
- “It would be most odd if something as important as the rights and obligations of the owners is found on a legend in the plan and not in the body of the assignment and clearly expressed in **words**, I do not regard the third legend as showing that the developer had chosen not to reserve the partition wall to itself .... and had, instead, assigned the same to the defendants.”

## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd and Others (2010) – Court of Appeal

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- Besides, under the DMC, the term 'Common Areas and Facilities' means and includes '... load bearing walls, foundations, columns, beams and other structural supports of the Development ...' and '... such areas within the meaning of "common parts" as defined by section 2 of the BMO'.
- DMC provides : 'No Owner or the Manager shall make any **structural alteration** to any part of the Development owned by him (including but not limited to the external walls, structure or façade of the Development or any installation or fixture therein) **which may damage or affect or interfere with the use and enjoyment of any other part or parts of the Development ...'**

## (2) Loadbearing partition wall –

Central Management Ltd v Light Field Investment Ltd and Others (2010) – Court of Appeal

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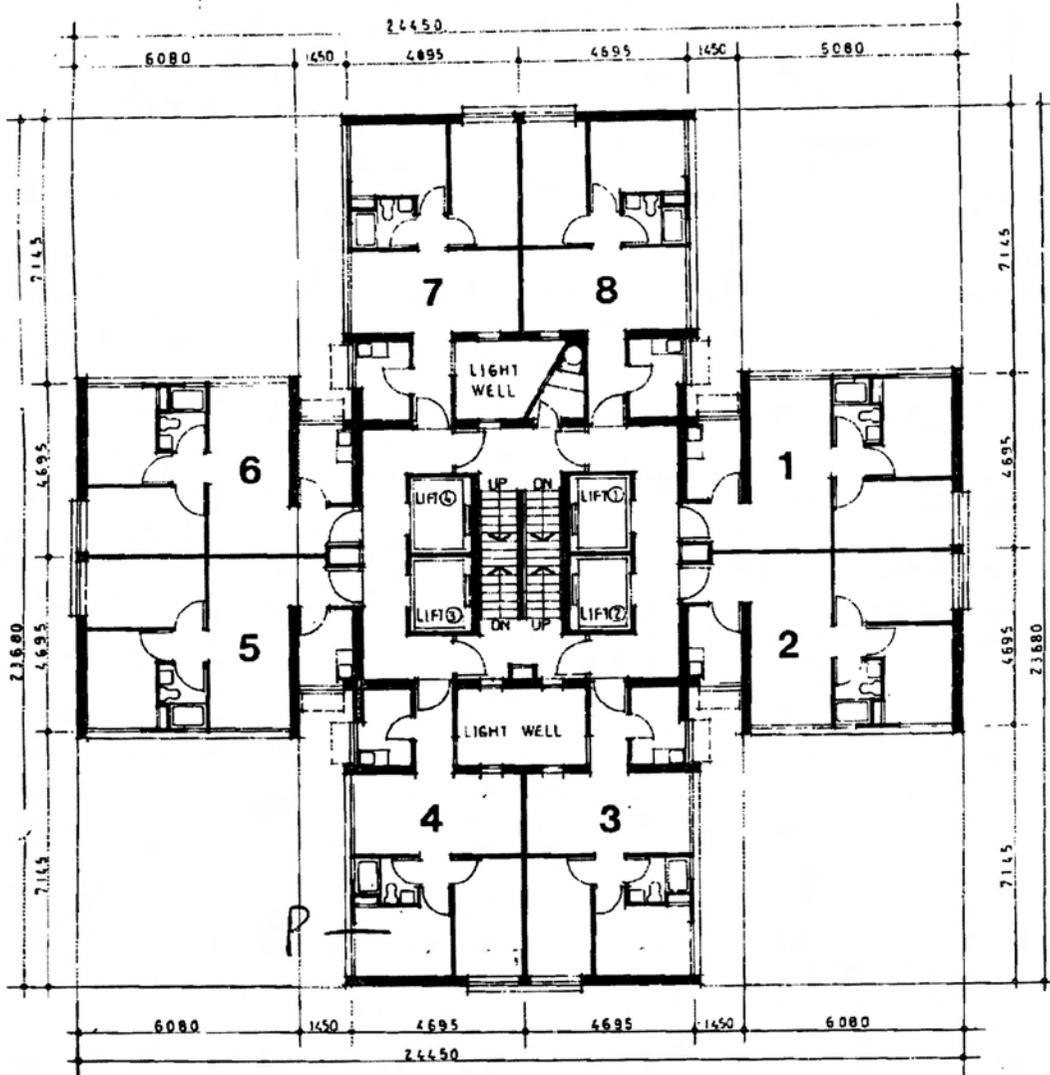
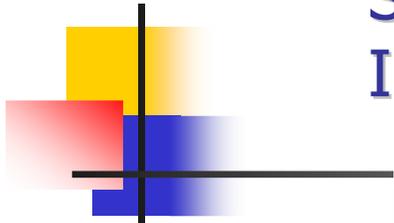
- ‘The removal of a structural part situated between two units clearly will have an impact on the structural stability of the development as a whole. Hence, as one would expect, for the management of such a development, the structural elements are designated as common parts not within the exclusive rights of an individual owner.... This cannot be the intention of the parties when the DMC has not created such an exception.’ (per His Lordship Cheung JA)
- In relation to the argument of **salable area** mounted by the defendant, Justice Cheung JA said : “The definition of Saleable Area is to show how the saleable area is to be measured for the **purpose of calculating the sales price of the units**. As to what was actually assigned one looks to **the whole of the title documents** to ascertain the intention of the parties”.

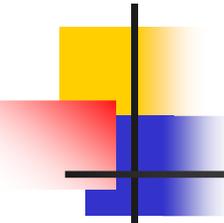
# (3) Non-structural partition wall

■ **The crux of whether it is a common part or not - lies on whether the construction of the Assignment and /or DMC stipulates the partition wall has been assigned or not :-**

- (a) Tam Sze Man and Another v The IO of Shan Tsui Court (2010) – Court of First Instance – “On a true construction of the 1<sup>st</sup> Assignments and the DMC, the plaintiffs have failed to prove that the Partition Wall is for its exclusive use, occupation and enjoyment” (Para.47)
- (b) The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010) – Court of Appeal – “Whether the partition wall has been specified or designated ... for the exclusive use .... For an owner is a question of construction.” (Para. 28)
- (c) Central Management Ltd v Light Field Investment Ltd & Others (2010) – Court of Appeal – “Whether the partition wall is within the ambit of Common Areas and Facilities is a matter of construction of the terms of the title documents.” (Para. 17)
- (d) Metro City Management Ltd v Tsui Fee Hung Vincent and Lam Wai Fun (2005) – Court of Appeal – “The whole of the flat and the flat roof which appertain thereto has been assigned for the exclusive use of the defendants ... As the judge pointed out, it would be absurd to consider that any of the other owners should have a right to access to that part of the wall which was otherwise clearly bounded by the defendants’ property.” (Para. 16)

# 2nd To 28th Floor Plan For Blocks A, B, C & D SHAN TSUI COURT, CHAI WAN INLAND LOT NO.92

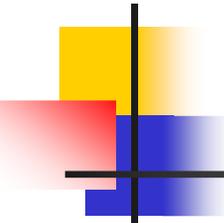




### (3) Non-structural partition wall (**Tam Size Man and Another v The IO of Shan Tsui Court**)

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- The Plaintiff sought to demolish the **partition wall between 2 flats**. The defendant refused to consent despite being shown an **architect's certificate that the Partition Wall was not a structural wall** and its alteration would have no structural impact on the building.
- **The centre of dispute is whether the Partition Wall is a common part** of the estate and whether or not the plaintiff were in breach of the DMC in making structural alteration to the flats



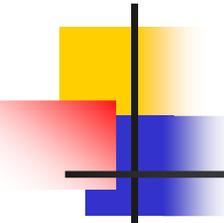
## (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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### (a) 1<sup>st</sup> Assignments

- “All those Ten equal undivided 8,962nd parts or shares of and in ALL THAT piece or parcel of ground known and registered in the Land Office as CHAI WAN INLAND LOT NO. 92 And of and in all messuages erections and buildings thereon TOGETHER with the **sole and exclusive right and privilege to hold use occupy and enjoy ALL THAT FLAT NO. 4 on the 21ST FLOOR of the said building** (which said Flat for the purpose of identification only is shown **coloured pink on the Plan annexed hereto** and is hereinafter referred to as “the said premises”) ... EXCEPT AND RESERVED unto the Vendor and its assigns the exclusive right to hold use occupy and enjoy all other flats and all car-parking spaces open bays management offices and caretakers offices under in and of the said building ... **AND SUBJECT to and with the benefit of the Deed of Mutual Covenant ...**”

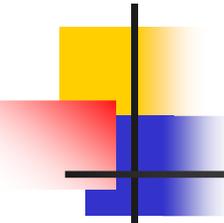
- (a) The partition wall in dispute was coloured pink on the annexed Plan.



### (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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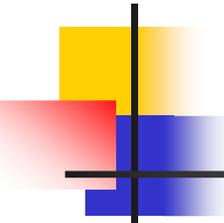
- The court held that such **textural description** merely gives the owner the right to the exclusive use of the floor and ceiling surfaces of the Property and the air space between them, in other words, of the entire volume of the floor space. (Para. 22)
- The 1<sup>st</sup> Assignments reserved to the Housing Authority (i.e. the developer) the exclusive right to other flats, car parking spaces, open bays, management and caretakers' offices but did not mention anything about common parts as defined in BMO. They, however, specifically subjected the First Owners to the DMC. **There was no express reservation in the textual description of the 1<sup>st</sup> Assignments of any exclusive right of the flat owners to the Partition Wall.**



### (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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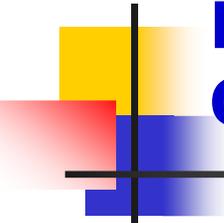
- (b) Plans annexed to the 1<sup>st</sup> Assignments
- 
- The Partition Wall was coloured pink in **each** of the plans of Flat 3 and Flat 4. The 1<sup>st</sup> Assignment of Flat 4 was earlier in time than that of Flat 3. Having been assigned Flat 4, could the first owner demolish the Partition Wall, claiming that he had the exclusive right to it ? And if the Housing Authority (the developer) had already assigned the Partition Wall to the first owner, how could it also assign the same wall to the owner of Flat 3 ? The court commented that it clearly demonstrates **the need for clear descriptive text instead of a coloured plan to define the exclusive rights of an owner. Besides, something as important as the exclusive rights of an owner should be clearly expressed in words and not just in the legend of a plan.**



### (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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- Besides, the court found that each plan has coloured pink **the whole area representing that Flat and all walls (including, as conceded by the plaintiffs, the structural external walls and a wall attached to the lift well)**. One wall (closet to Flat 2 and Flat 5 respectively) is coloured half in pink
- The court therefore considered that **the plan is not reliable and accurate enough** to be relied on.

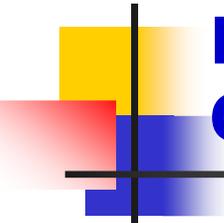


## (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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### (c) DMC

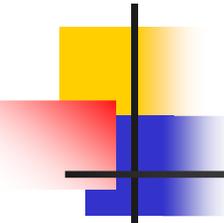
- **The DMC has not specified or designated the Partition all as being for the exclusive use, occupation or enjoyment or the owners of Flat 3 and Flat 4.**
- Cl. 1(c) of DMC : “**The Authority** while it is the manager of the Estate under the provision of [the DMC] **shall have the right to the exclusive use and occupation** of any part of any building within the Estate which is designated set aside and intended to be used as caretakers quarters machine rooms pump rooms switch rooms and **any other purpose required for the management and serving the Estate as a whole or of any building or part of any building therein.**”
- Clause 13 (c) of the DMC : “For the purpose of this Deed ‘common parts’ means the whole of the Estate except such parts thereof as have been **specified or designated in an instrument registered in the Land Office** as being for the exclusive use occupation or enjoyment of an owner or owners.”



### (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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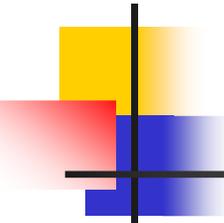
- Clause 3 and Paragraph 4 to the Second Schedule of the DMC prohibits alteration to the structure of a flat :-
- “Not to make any structural alteration to any flat or which he is the owner [1<sup>st</sup> limb] nor cut injure damage alter or interfere with any part or parts of the Estate in common use [2<sup>nd</sup> limb] or any of the sewers drains ... or services of the Estate”



### (3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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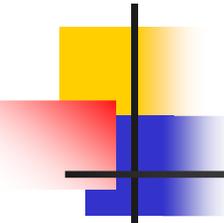
- The court rejected the argument that the removal of a non-loadbearing partition wall is not structural alteration.
- “The notion that structural alteration must involve the load-bearing fabric of the building was rejected. In the context of the DMC in question, structural alteration must include permanent physical alteration to the fabric of the building, affecting the common interests of the owners.”



(3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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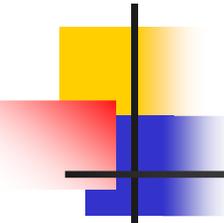
- “The **architect’s certificate** produced by the plaintiff stating that the Partition Wall was not structural in nature accordingly **does not assist.**”
- “... the demolition of the Partition Wall undoubtedly pertains to the **framework and structure of Flat 3 and Flat 4** respectively and affects their visual aspect. It removes one **boundary wall** of each Flat and thus alters the structure.”



(3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

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- (d) BMO
- The court ruled that the Partition Wall is a a **“boundary wall”** that sets apart Flat 3 and Flat 4. (per Paragraph 16 of the judgment)

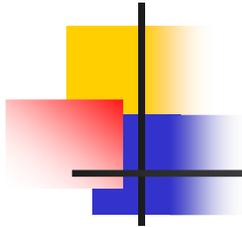


(3) Non-structural partition wall - **Tam Sze Man and Another v The IO of Shan Tsui Court – Court of First Instance**

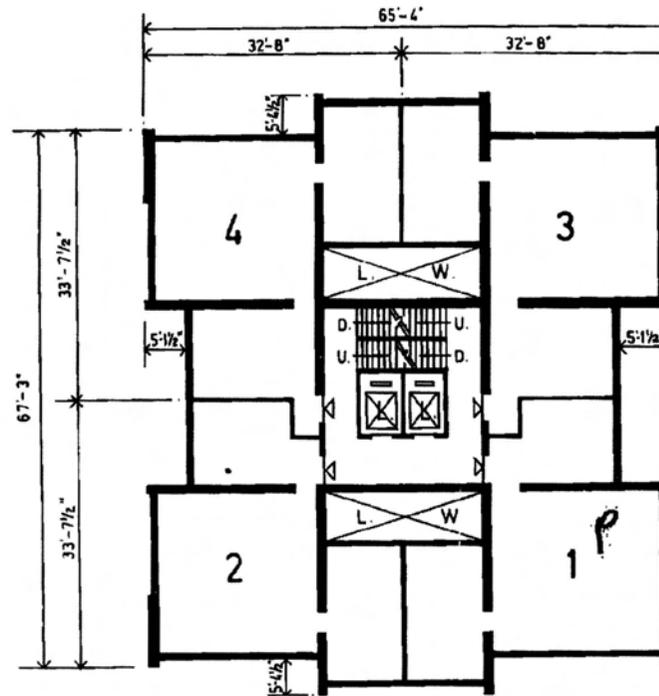
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- Conclusion
- “On a true construction of the 1<sup>st</sup> Assignments and the DMC, the plaintiffs have **failed to prove that the Partition Wall is for its exclusive use, occupation and enjoyment**”, and the court ruled that the Partition Wall in question is a common part. (per Paragraph 47 of the judgment)

# 18th Floor Plan of Block E, Westland Gardens, No.4 Westlands Road, Hong Kong



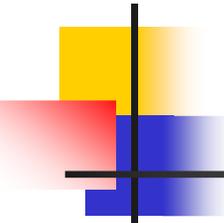
SITE PLAN  
SCALE : 100'-0"=1"



BLOCK

18<sup>TH</sup> FLOOR PLAN  
SCALE : 1/16"=1'-0"

*Leslie Ouyang*  
LESLIE OUYANG  
B.S. ARCH. F.I. STRUCT. E.  
M.A.M. SOC. C.E. M. CONS. E.  
CHARTERED ENGINEER  
AUTHORIZED ARCHITECT



## (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

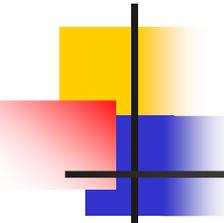
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### Background:

- Two adjoining flats E1801 and E1803 separated by a partition wall, and the Respondents caused the partition wall to be removed and converted the two flats into one
- The Respondents refused to reinstate the partition wall
- The case went up to the Court of Appeal

# (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

- (a) 1<sup>st</sup> Assignment (to a Shop G1 on the G/F and LG/F of Westland Gardens)
- “EXCEPTING AND **RESERVING** unto the **Vendor** and its assigns (i) the right to the **exclusive use occupation and enjoyment of all the shops flats flat roofs main roofs open yards and car parking spaces of and in the said buildings** [Westlands Gardens] and the said land [the Remaining Portion of Quarry Bay Inland Lot No.15] **other than the said premises** [Shop G1] **hereby specifically assigned ...”**
- “Under the 1<sup>st</sup> Assignment in the present appeal, the whole of the areas designated as flats were **reserved to the developer**. There was **nothing in the 1<sup>st</sup> Assignment to suggest that the partition walls in the domestic portion were common areas.**” (Para.33)
- (b) Assignments of Flat E1801 and E1803
- Respondents as joint tenants with Flat E1801 coloured pink on the Floor Plan annexed. The grant was subject to and with the benefit of the DMC. **The Partition Wall between E1801 and E1803 was not coloured pink.**

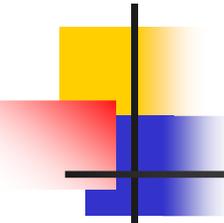


# (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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- (c) DMC
- Clause 4 of Schedule of the DMC : “Not to make any **structural alteration** to any shop, roof, flat or car parking space of which he is the owner which may damage, or affect or interfere with the use and enjoyment of any other part of any building on he said land **whether in separate or common occupation or use**, nor cut, injure, damage, **alter or interfere with any part or part of any building in common use ...**”
- At trial, experts from both parties agreed that the partition wall was not a load-bearing wall and the Court ruled that the partition wall does **not** form “**part of the fabric of the building**” or “**an integral part of the building**”, and therefore there involved no structural alteration.

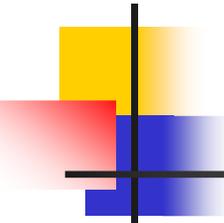
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### (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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- (D) BMO
- 
- The judges do not believe that the expression “boundary wall” covers an internal partition wall. Rather it refers to a wall at a boundary of a relevant site or development. The Chinese version of “**boundary wall**” in **BMO Schedule 1** is “**邊界牆**” which supports this view
- If an internal partition wall was intended to be included, there would have been an **express reference** to it. We do not believe the draftsman would have been content to let it be inferred from the expression “boundary wall”

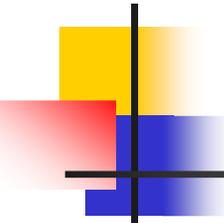


# (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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## ■ Conclusions

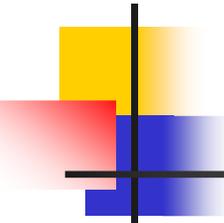
- “Whether the partition wall has been ‘specified or designated... for the exclusive use... for an owner’ is a question of construction”
- The court cast doubts on the possible benefits to the 1<sup>st</sup> Purchaser by making the non-structural partition wall as a common part:-
  - *“Since the 1<sup>st</sup> Purchaser was a purchaser only of the G-1 shop, it must be asked what possible interest would the 1<sup>st</sup> Purchaser have in making the non-structural partition walls on the domestic portion of the building “common areas” at all”*
- The court continues to say that: *“The areas occupied by “the flats” in the building - including the partition walls - were designated under the DMC and the 1st Assignment “for the exclusive use, occupation or enjoyment of the owners” of the flats concerned. It follows that the wall in the present case falls outwith the first limb of the definition of “common parts” under the BMO”*



## (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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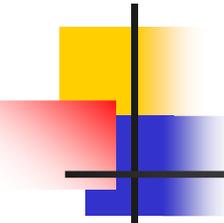
- The court is even bold enough to ruled that:-
- "... *in the present case, there was **no specific reference to the wall** [in the assignment] ... although the assignment plan was coloured, **the actual wall itself had not been coloured over.** [The judges of this court however] **attach no particular significance to that**" (Para. 38)*
- And the court subsequently held that:-
- "*For all intents and purposes, the partition wall is for the sole use and benefit of the owners of Flats E1801 and E1803*"
- For the DMC, the court ruled that there was nothing in it specifying the internal partition wall as a common area



## (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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- If the partition wall was not common parts and had been reserved by the Developer, who are the owners of the partition wall?
- Since the Applicant does not claim to have obtained title to the partition wall from the Developer, it probably does not matter who owns the partition wall
- The court agrees that the partition wall is owned by the flat owners by making use of s17 of the Conveyancing and Property Ordinance, Cap 219:
  - *"Unless the contrary intention is expressed in the assignment, an assignment shall operate to assign all the estate, right and interest in the land assigned which the assignor has in that land and which he has the power to assign"*

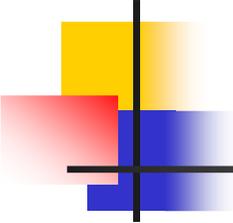


### (3) Non-structural partition wall – The Incorporated Owners of Westlands Garden v Oey Chiou Ling & Another (2010)

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- Thus, whatever interest the Developer had in the partition wall has also been conveyed to the owners of Flats E1801 and 1803
- Thus, by analogy with the law on co-ownership of the dividing wall as between adjoining land owners, the partition wall is “co-owned by” the owner of the two adjoining flats
- For the above reasons, the Applicant’s claim must fail

<u>Case</u>	<u>Court</u>	<u>Dispute</u>	<u>Assignment</u>	<u>DMC</u>	<u>BMO</u>	<u>Judgment</u>
Nation Group - Cheong Wah Bldg	FA (2000)	UBW constructed on soffit of canopy	...entire 1/F and its canopy.. Difference in floor plan	..prohibit owners from erecting shade...on extr	NA	Exclusive use of canopy without limitation
Metro City	CA (2005)	Canopy breaches DMC	Exclusive use of 1/F flat roof	No shades outside exterior of Tower	NA	Breaches DMC External wall is common part
Chi Fu Fa Yuen	LT (2007)	Opening on loadbearing wall of units	Wall not designate as exclusive use	Not to make structural alteration	S.2 and Sch. 1 applicable S.34I not to convert c.p.	Wall is common part Breaches DMC Breaches BMO S.34I
Shan Tsui Court	CFI (2010)	Demolish partition wall of 2 adjoining units	Wall not expressly assigned to owner	..not to make structural alteration..	Sch. 1 include boundary wall	Wall not assigned Structural alteration = permanent physical alteration Boundary wall Importance of word
Central Mgt (Highcliff)	CA (2010)	Remove designated part of wall of 2 units	Some element of construction can be removed	Common area incl. structure Prohibit structural alter	S.34I not to convert common part	Legend on plan disregarded Structural stability Importance of terms
Westland Garden	CA (2010)	Partition wall removed & 2 units combined	Partition wall not suggest as common area	Common part not clearly defined	S.2 & Sch. 1 alleged to be applicable	Rejected boundary wall concept S.17 of C&P Ord. partition wall co-owned by owners



# The Devil of “Common Area”

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- Q & A

<u>Case</u>	<u>Court</u>	<u>Dispute</u>	<u>Assignment</u>	<u>DMC</u>	<u>BMO</u>	<u>Judgment</u>
Nation Group - Cheong Wah Bldg	FA (2000)	UBW constructed on soffit of canopy	...entire 1/F and its canopy.. Difference in floor plan	..prohibit owners from erecting shade...on extr	NA	Exclusive use of canopy without limitation
Metro City	CA (2005)	Canopy breaches DMC	Exclusive use of 1/F flat roof	No shades outside exterior of Tower	NA	Breaches DMC External wall is common part
Chi Fu Fa Yuen	LT (2007)	Opening on loadbearing wall of units	Wall not designate as exclusive use	Not to make structural alteration	S.2 and Sch. 1 applicable S.34I not to convert c.p.	Wall is common part Breaches DMC Breaches BMO S.34I
Shan Tsui Court	CFI (2010)	Demolish partition wall of 2 adjoining units	Wall not expressly assigned to owner	..not to make structural alteration..	Sch. 1 include boundary wall	Wall not assigned Structural alteration = permanent physical alteration Boundary wall Importance of word
Central Mgt (Highcliff)	CA (2010)	Remove designated part of wall of 2 units	Some element of construction can be removed	Common area incl. structure Prohibit structural alter	S.34I not to convert common part	Legend on plan disregarded Structural stability Importance of terms
Westland Garden	CA (2010)	Partition wall removed & 2 units combined	Partition wall not suggest as common area	Common part not clearly defined	S.2 & Sch. 1 alleged to be applicable	Rejected boundary wall concept S.17 of C&P Ord. partition wall co-owned by owners